(25)

No. 387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

UNION DIME SAVINGS BANK,

Petitioner,

against

IRA ADAMS, CLIFFORD GREGORY, CECIL HUNT, JACK PIZZITOLA and LEONARDO RATCLIFFE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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October Term, 1944

Union Dime Savings Bank,

Petitioner,

against

Ira Adams, Clifford Gregory, Cecil Hunt, Jack Pizzitola and Leonardo Ratcliffe,

Respondents.

Comes now Union Dime Savings Bank, your petitioner, by Robert R. Bruce, as counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable United States Circuit Court of Appeals for the Second Circuit require said Court to certify and remove to this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioner was defendant-appellant and Ira Adams and other persons named therein were plaintiffs-appellees, and to that end your petitioner now tenders herewith its petition with a certified copy of the record in said cause.

Robert R. Bruce,
Counsel for Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, Union Dime Savings Bank, respectfully shows to this Court as follows:

Parties and History of the Proceedings

1. Petitioner is a savings bank and a corporation duly organized and existing under the laws of the State of New York and maintains its place of business in the City, County and State of New York.

2. Respondents were employed by petitioner as elevator operators and in other capacities as building service employees at various times between October 24, 1938 and February 26, 1942, in two loft buildings owned by petitioner and located in the Borough of Manhattan, New York City. Petitioner originally acquired both loft buildings thru foreclosure of mortgages held by it as investments and carried on none of its functions as a savings bank in these buildings.

3. Respondents commenced this action on July 22, 1942, in the United States District Court for the Southern District of New York under Section 16(b) of the Fair Labor Standard Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201, et seq.) to recover overtime wages allegedly due under Section 7(a) of that Act for their respective periods of employment by petitioner between October 24, 1938, effective date of the Act, and February 26, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

4. Petitioner's answer denied that respondents were covered by the Act and, in addition, pleaded several affirmative defenses and an equitable counterclaim predi-

cated upon the fact that respondents' entire employment had been governed by collective bargaining agreements between the parties and upon the conduct of respondents under those agreements. In brief, the affirmative defenses were (1) payment based upon a construction of the collective agreements in compliance with the Act; (2) estoppel against respondents' complete claim; (3) estoppel against respondents' claim for liquidated damages, attorneys fees and costs alone; (4) unconstitutionality of Section 16(b) of the Act for want of due process if recovery of liquidated damages were permitted under all the circumstances of this case; (5) right to arbitrate respondents' claims; and finally (6) a counterclaim for reformation of the collective bargaining agreements upon the ground that they were entered into and carried out by the parties under a mutual mistake of law and fact or of law alone regarding the application of the Act to their employment relationship and that the true intention of the parties was thwarted by such mutual mistake.

5. By order dated February 11, 1943 (R. 89-93),* Judge Simon H. Rifkind struck out all petitioner's affirmative defenses as insufficient in law but allowed the counterclaim for reformation of the collective bargaining agreements to stand for trial.

6. Trial was had before Judge Harold P. Burke in March, 1943. At the trial, petitioner, deeming the issue of coverage foreclosed by this Court's decision in *Kirschbaum* v. *Walling*, 316 U. S. 517 (because the greater part of the rentable area of both buildings was occupied by tenants producing goods for commerce) stipulated that respondents were covered by the Act during their employment. It was also stipulated that the proof should be limited to the case of the respondent Ira Adams and if he was found entitled to recover, then all respondents should recover on the basis of certain specified amounts for overtime compensation under the Act.

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* All references are to folios of the Record for greater particularity.

7. An opinion and findings of fact and conclusions of law dated November 11, 1943 (R. 1138-1170) sustaining respondents' claims were filed by Judge Burke and pursuant thereto judgment (R. 1171-1176) was entered against petitioner on November 27, 1943 in favor of respondents for the sum of $3,947.02, consisting of $1,498.76 overtime compensation, $1,498.76 liquidated damages, $800 attorneys' fee (stipulated as reasonable in event of respondents' recovery) and $149.50 costs and disbursements.

8. As disclosed by Judge Burke's opinion (R. 1168), judgment against petitioner's counterclaim for reformation and in favor of respondents was rested on the ground that "the evidence falls short of establishing clearly that the Union representative shared the same belief (i. e., that the Act did not apply) and that the alleged mutual mistake resulted in a contract which failed to express the actual intent of the parties."

9. An appeal was thereupon taken to the United States Circuit Court of Appeals for the Second Circuit by petitioner from both the final judgment and from the intermediate order striking the various affirmative defenses, excepting the defense of arbitration which had become moot because of the trial. On July 18, 1944, the Circuit Court affirmed the judgment and granted an additional allowance of $500 to respondents' attorneys as counsel fees for the appeal (R. pp. 399-403).

10. On July 24, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholdings its mandate in this case for a period of thirty days pending this application by your petitioner for a writ of certiorari to said Court.

Jurisdiction

11. The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925.

Facts as Established by the Findings

12. The relevant findings of the Trial Court are substantially as follows (both paraphrased and quoted findings being assigned their actual numbers in parentheses):

(3-4) Throughout plaintiffs' employment there existed certain master collective bargaining agreements between The Realty Advisory Board on Labor Relations, Inc., an organization of building owners and managing agents in the Borough of Manhattan, New York City, and Local 32-B, Building Service Employees' International Union, A. F. of L., covering terms and conditions of employment of building service employees in defendant's two loft buildings and other signatory buildings (R. 1139-1140). These collective agreements were the so-called Mayor's Board of Survey Agreement which, as supplemented by various interim arbitration awards, was effective from March 15, 1936 to April 23, 1939 and the Sloan Agreement which, also supplemented by an arbitration award known as the Sloan Award, was effective from April 24, 1939 to April 20, 1942 (R. 1140). (Complete copies of these agreements are included in the separate binder of exhibits stipulated to be handed up to the Circuit Court on argument of the appeal (R. 1186-1188) as Exhibits A-1 to A-6 inclusive and Exhibits B and B-1.)

(5-6) Plaintiffs were at all times members of Local 32-B (sometimes called the Union herein) and "were employed by and actually worked for the defendant on the basis of a specified regular maximum workweek at a specified regular weekly wage and were paid at the rate of time and one-half for all hours worked in excess of such regular maximum workweek. Pursuant to the collective bargaining agreements plaintiff Ira Adams was employed by and actually worked for the defendant during the following periods on the following basis: October 24, 1938 to April 27, 1939, $23 per week for a 48 hour week; April 28, 1939 to October 24, 1940, $24 per week for a 47 hour week; October 25, 1940 to February 26, 1942, $25 per week for a 47 hour week" (R. 1141-1142).

(21) "The form of the collective agreements, particularly the Madden Award and the Sloan Agreement indicate that the collective agreements were made by the Union as agents for its members including the plaintiffs herein. The plaintiffs, as to wages and hours and working conditions, were bound by the terms of said agreements" (R. 1150).

(7) In loft buildings signatory to the Sloan Agreement, of which there were about 700 in the Borough of Manhattan employing about 3500 employees, the percentage of space occupied by tenants engaged in production of goods for commerce varied from a small percentage to one hundred per cent (R. 1142-1143).

(8) "During the negotiations of the so-called McGrady Agreement in the Garment Center in December 1938 through February 1939, there was brief discussion between the negotiating committees of the Union and representatives of associations representing building owners regarding the possible application of the Fair Labor Standards Act of 1938 to building service employees in loft and office buildings operating under collective agreements made between the Union and said associations and the Realty Advisory Board. Such discussions were incidental to other questions involved and the matter was but casually treated and summarily dismissed. The negotiating committee of the Union in those discussions was substantially the same committee which negotiated the Sloan Agreement with Realty Advisory Board. Some of the members of the Realty Advisory Board negotiating committee in the Sloan Agreement negotiations were also members of the negotiating committee of the associations in the McGrady agreement negotiations" (R. 1143-1144).

(9) "The Sloan Agreement was negotiated between March 1939 and July 1939. During the negotiations there was little or no discussion of the possible application of the Act to the employment relationship involved in said negotiations" (R. 1145).

(10) "During the period covered by the complaint no claim was ever made by the Union to the Realty

Advisory Board, or to the defendant, or to the arbitrator, or to the Impartial Chairman, that the question of benefits under the Act should be arbitrated under the provisions of the collective Agreements nor that the said agreements should be adjusted to comply with the requirements of the Act" (R. 1145-1146).

(11) "Between June 25, 1938, when the Act was approved, and June 1, 1942, no claim was ever made by the Union to the defendant or its managing agent that the members of the Union employed in the two buildings were entitled to the benefits of the Act or to any other or different rate of pay than that prescribed by the collective bargaining agreements" (R. 1146).

(12) "Between the date of approval of the Act and July 22, 1942, when this action was commenced, no claim was ever made by any of the plaintiffs that they were entitled to benefits of the Act in any respect or to any different rate of pay than that prescribed by the collective agreements" (R. 1145-1146).

(13) "The plaintiffs were paid weekly and signed weekly pay rolls acknowledging payment in full for all hours worked during each week when employed by the defendant" (R. 1146).

(15) "No provision was made by the defendant and its managing agents in its annual estimates of the cost of operation and maintenance of said buildings for overtime payments under Section 7 (a) of the Act" (R. 1148).

(16) "During the period covered by the complaint the two buildings were operated by the defendant at a loss and were sold at a loss before the commencement of this action" (R. 1148).

(17) "Between October 1938 and July 1939, when the Sloan Agreement was signed, there was no new contractual relationship entered into by the parties but merely a continuation of the relationship as modified and fixed by the Madden Award" (R. 1148).

(18) "There is no clear and convincing proof that, at the time of the signing of the Sloan Agreement in July, 1939, and at the time of the making of the Sloan Award in October, 1940, the parties to those collective bargaining agreements were mutually mistaken as to the applicability of the provisions of the Fair Labor Standards Act to building service employees in loft buildings, such as the plaintiffs" (R. 1149).

Questions Presented

13. On the basis of the foregoing, petitioner desires this Court to review the following questions:

(a) Whether collective bargaining agreements which provided no express hourly rate of pay but called for a specified regular weekly wage and overtime compensation at the rate of time and one-half for hours in excess of the regular workweek (of 48 and 47 hours in successive periods), were in compliance with Section 7(a) of the Act where the regular hourly rate reasonably to be implied therefrom always exceeded the minimum hourly rate required by Section 6 of the Act.

(b) Whether the collective bargaining agreements and the conduct of respondent employees thereunder in relation to petitioner give rise to an equitable estoppel against the recovery of liquidated damages, attorneys' fees and costs by respondents. Implicit in this question, whether any concept of public policy embedded in the Act or in the law generally precludes the raising of such an estoppel.

(c) Whether allowing respondent employees to recover liquidated damages, attorneys' fees and costs under all the circumstances of this case produces a result so harsh and grossly inequitable as to constitute an application of Section 16(b) of the Act that

is violative of due process under the Fifth Amendment.

(d) Whether the finding of the Trial Court, affirmed by the Circuit Court, that there is no clear and convincing proof of mutual mistake in the making and carrying out of the collective bargaining agreements and of consequent frustration of the true intention of the parties, is not clearly erroneous.

(e) Whether, as held by the Second Circuit Court of Appeals, "reformation of a contract which in terms violated a remedial statute would tend to frustrate the administration of the Act and contravene its policy" (R. p. 403).

Reasons in Support of Petition

14. There are involved in this case novel questions in the construction and application of the Fair Labor Standards Act of 1938 not yet reviewed by this Court or, in the case of two questions presented, not so clearly and directly settled as to dispose of a mass of litigation which has arisen under the Act.

(a) This Court has not yet reviewed the question whether employees who have accepted the full benefits of collective bargaining agreements freely and fairly negotiated and made no claims or demands under the Act during the life of such agreements, particularly under circumstances tending to show that both employees and employers believed in good faith that the Act did not apply to their employment relationship, can still recover liquidated damages, attorneys' fees and costs under Section 16(b) of the Act. In other words, this Court has not reviewed a case where the defense has been made that circumstances such as here presented give rise to an

estoppel against claims for liquidated damages under Section 16(b) of the Act as distinguished from overtime compensation under Section 7(a).

(b) This Court has not yet reviewed the question whether it would be contrary to the policy of the Act to reform a collective bargaining agreement entered into and carried out under a mutual mistake regarding application of the Act to the employment relationship involved, in order to carry out the true intention of the employer and employees to make a lawful agreement for a specified regular weekly wage.

(c) In *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

> "But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

Of course, in the present case there was a definite contractual ceiling of 48 or 47 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. * * *" In the present case, respondents worked on a regular weekly basis. Moreover, the provision for special overtime compensation for hours worked in excess of the regular workweek implied that compensation for any legal overtime within the regular workweek was absorbed in the regular weekly wage. This implication is fortified by respondents' regular weekly acknowledgments of full payment for all hours worked and their failure currently to demand additional compensation.

(d) Likewise, in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, it was held that the imposition of liquidated damages under Section 16(b) of the Act did not violate due process. It does not credit the function and fair tradition of this Court to suggest that this holding was meant to apply to every possible set of circumstances irrespective of the harshness and inequity of the result. That the holding is limited to the specific facts of the *Missel* case is borne out by the Court's detailed exposition (p. 582) of the employer's reasonable opportunity to determine in advance that his employee was covered by the Act. Until June 1, 1942, some months after respondents' employment by petitioner had ended, coverage in this case was distinctly doubtful. Indeed, the great weight of authority was against it. *Fleming* v. *Arsenal Building Corporation*, 125 F. (2d) 278, 281.

15. The widespread public interest and great importance of these questions to real estate owners and their building service employees is manifest. The decision of this Court on June 1, 1942, in *Kirschbaum* v. *Walling*, 316 U. S. 517, came as a distinct surprise and shock to independent landlords of loft buildings all over the country. Radical adjustments were necessary in many cases and were promptly made for the future. However, such

adjustments could not dispose of the huge existing liabilities for overtime compensation and equal amounts of liquidated damages which fell upon real estate owners still suffering in many sections of the nation from the long depression. In New York City alone, the retroactive liability of loft building owners was estimated to approximate twelve million dollars. To the knowledge of petitioner's attorneys, there are hundreds of cases pending in the Federal and State Courts in New York City at various stages of litigation involving the same or similar issues as those now presented by this case. A large number of cases have been stipulated to abide the ultimate decision in this case or in another case, *Greenberg* v. *Arsenal Building Corp. and Spear & Co. Inc.*, also decided by the Second Circuit Court of Appeals at the same time as the present case, where additional questions of law are presented as well as similar ones involving other collective bargaining arrangements. (A petition for writ of certiorari will soon be presented in the *Greenberg* case). The fact that there were 700 loft buildings in the Borough of Manhattan, New York City, where building service employment was governed by the collective bargaining agreements peculiar to this case, demonstrates the importance of this litigation.

Moreover, it is possible that the retroactive liabilities will not be limited to loft buildings but will extend to office buildings,—at least those buildings where, though no physical production actually occurs, the tenants administer and supervise production elsewhere. In *Rucker* v. *First National Bank,* 138 F. (2d) 699 (C. C. A. 10th, 1943), it was held in such a case that the building service employees are not covered by the Act. This Court denied certiorari. 321 U. S. 769. But in *Borella* v. *The Borden Company,* F. (2d) (C. C. A. 2d, decided July 28, 1944), a different result has been reached. If the *Borella* doctrine is ultimately sustained, the existing retroactive liabilities of landlords of loft and office buildings in New York City and, in fact, throughout the

country, will be substantially increased. The final and authoritative settlement by this Court of the questions here presented will necessarily be conclusive of a great mass of pending and threatened litigation.

16. Finally, this case squarely presents questions as to the validity and effectiveness of collective bargaining agreements negotiated and carried out during a period when the application of the Act to employments of the character here involved was not seriously regarded by reasonable men, laymen, lawyers and courts alike. If the decision of the courts below in this case is to stand, "the process of collective bargaining is turned into a scrap of paper" with results that "cannot be joyfully regarded." (Rifkind, J. on the motion to strike the affirmative defenses and counterclaims in this case, R. 87-89.)

Conclusion

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

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Counsel for Petitioner.

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Dated: August 22, 1944.

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IRA ADAMS, CLIFFORD GREGORY, CECIL HUNT, JACK PIZZITOLA and LEONARDO RATCLIFFE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

1. Opinions Below.

The opinion in the District Court is reported in 53 Fed. Supp. 782 and is printed at pages 386-390 of the record (1156-1170).* The opinion of the Circuit Court of Appeals dated July 18th, 1944 is reported in —— Fed. 2d. —— and is printed at pages 399-402 of the record.

2. Statement.

This was an action instituted by respondents to recover unpaid overtime wages pursuant to the provisions of the Fair Labor Standards Act of 1938 (Act of June 25th, 1938, C. 676, 52 Stat. 1060, 29 U. S. C. A. Sec. 201 *et seq.*) to-

*References are to folios in the record unless otherwise indicated.

gether with liquidated damages, attorneys' fees and costs. The action was commenced in the United States District Court for the Southern District of New York.

Respondents, during the period in suit, were employed as elevator operators, firemen and in similar occupations in loft buildings owned by the petitioner in the Borough of Manhattan, City and State of New York (Findings of Fact #1, 2, fol. 1138). They were employed pursuant to the terms of various union contracts (1140).

There were originally five plaintiffs but six additional plaintiffs were added pursuant to agreement at a pre-trial conference on February 19th, 1943 (3). In order to shorten and facilitate the trial a stipulation was entered into between the parties (Plaintiff's Exhibit #2, 1087-1098) pursuant to which the parties agreed that plaintiff "Ira Adams at all the times mentioned in the complaint was engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act" (1088). It was further stipulated and agreed that if the Court found in favor of plaintiff Ira Adams, that the other named plaintiffs would thereupon be entitled to recover against the defendant in accordance with certain specified amounts set forth in Schedule "A" attached to said stipulation (1096-1098) in addition to such liquidated damages, attorneys' fees and costs as the Court might award (1089). It was further stipulated that plaintiff Ira Adams received $23.00 per week for a 48 hour week from October 24th, 1938 to April 27th, 1939; $24.00 per week from April 28th, 1939 to October 24th, 1940 for a 47 hour week; and $25.00 per week for a 47 hour week from October 25th, 1940 to February 26th, 1942 (1091).

Thus the petitioner acknowledged that during the periods in question plaintiffs were covered by the Act and entitled to the benefits thereof. This concession was made by petitioner in view of the decision of this Court in *Kirschbaum Co.* v. *Walling* (combined with *Arsenal*

Building v. *Walling*), 316 U. S. 517. Petitioner interposed seven affirmative defenses and one counterclaim (30-62). By order dated February 13th, 1943 (89-93) all of the affirmative defenses with the exception of the second defense and counterclaim were stricken from the answer. The said second defense and counterclaim were dismissed after trial in the District Court (53 Fed. Supp. 782).

In a *per curiam* opinion the Circuit Court of Appeals for the Second Circuit affirmed.

In substance the defenses raised by the petitioner below in its pleadings (30-62) were as follows:

a. The petitioner claimed that although the respondents worked hours in excess of the statutory maximum, they had been paid in full (50-52) on the theory that the union contracts were reasonably capable of a construction consistent with the Fair Labor Standards Act. In said defense it was claimed that the parties had "impliedly agreed" that the regular hourly rate would be such a rate as would include payment for both straight time and overtime within the wages actually paid (51).

This proposition is stated in the petition herein in an erronious fashion at page 8, paragraph 13 (a). In said statement, it is assumed that a regular hourly rate can be reasonably implied from the agreements herein in a manner other than by application of the principle set forth by this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, wherein this Court stated (footnote page 580):

> "Wages divided by hours equal regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours".

b. Secondly, the petitioner sought to reform the Union Agreements in question (45-50) so as to insert in said

agreements a formula devised by its attorneys more than two (2) years after the date of the contract (840-844). This reformation was sought on the claim that there had been a mutual mistake of fact and law as to the applicability of the Fair Labor Standards Act at the time of the negotiation of the Union Agreements in question. This claim of mutual mistake was rejected on the facts both in the District Court (1149, 1153) and in the Circuit Court (page 402 of record) on the ground that defendants had not shown that such a mutual mistake either of law or of fact existed. The claim was rejected on questions of law as well.

c. Petitioner claimed that the conduct of respondents in accepting their pay without immediately demanding their overtime constituted an estoppel.

d. Petitioner further claimed that the imposition of liquidated damages and attorneys' fees constituted an unconstitutional application of the Fair Labor Standards Act.

3. Argument.

Summary of Argument.

A. On substantially all the questions raised this Court has ruled adversely to petitioner's contentions.

B. The opinions of the Circuit Courts and State Courts are uniformly opposed to petitioner's position on the questions raised herein.

C. No adequate reason is set forth in the petition herein for a review by this Court in this case.

POINT A.

On substantially all the questions raised this Court has ruled adversely to petitioner's contentions.

In connection with the defense of payment raised by the petitioners below (50-52) the petitioner argues that the regular hourly rate should be determined, not by dividing the wages by the hours as set forth in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, but by application of such a formula as would include time and a half for overtime hours within the wages actually paid (51). Their claim was that since the employees in question had been hired for a regular work week (even though in excess of the maximum hours set forth in the Act) at a regular wage, the parties had thereby "impliedly agreed" that overtime wages were included within the regular weekly wage.

The general proposition as to method of computation has been entirely settled by the decisions of this Court in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572 and *Warren-Bradshaw* v. *Hall,* 317 U. S. 88, 93. These decisions preclude the petitioner's method of computation.

The precise question was similarly determined in *Floyd* v. *DuBois Soap Co.,* 317 U. S. 596, where a contract for a definite weekly wage and work week was involved.

The second contention of defendants below, namely, that the contracts ought to be reformed on the ground that the parties would have inserted a formula whereby the overtime wages would have been included in the regular weekly wage, had they known of the applicability of the Fair Labor Standards Act, is of course, an attempt to accomplish by reformation that which cannot be accomplished by implication. This contention is invalid for the same reasons set forth *supra.* Furthermore in connection

with the counterclaim of petitioner below for reformation, it should be noted that both the District Court and the Circuit Court clearly and unequivocally rejected the petitioner's contention that there was a mutual mistake of either fact or law in connection with the negotiation of the Union Agreements in question (1149, 1153, page 402 of record). As stated by the Circuit Court in its opinion (page 402 of record):

> "Judge Burke said in his opinion that the evidence falls short of establishing clearly that the 'alleged mutual mistake resulted in a contract which failed to express the actual intent of the parties' and made a finding (#19) to that (fol. 403) effect. We cannot say that the contracts were made under mutual mistake merely because they violated the Act and might have been drawn in conformity with it and that they should, therefore, be recast in terms which, if originally adopted, would have been lawful. There was no proof that either party contemplated any such revised terms nor any reason to suppose that they would have been acceptable."

This is especially compelling in view of this Court's decision in *Philippine Sugar Estates Development Co., Ltd.* v. *Government of the Philippine Islands,* 247 U. S. 385, 391, wherein it was held that relief by way of reformation will not be granted unless the proof of mutual mistake be "of the clearest and most satisfactory character." See also:

Salomon v. *North British & Mercantile Ins. Co. of N. Y.*, 215 N. Y. 214, 217;
Porter v. *Commercial Casualty Co.*, 292 N. Y. 176, 181-2.

POINT B.

The opinions of the Circuit Courts and the State Courts are uniformly opposed to petitioner's position on the questions raised herein.

With regard to the defense of payment see:

Patsy Oil & Gas Co. v. *Roberts,* 132 Fed. (2d) 826, 827 (C. C. A., 10th);

Seneca Coal & Coke Co. v. *Lofton,* 136 Fed. (2d) 359, 362 (C. C. A. 10th); cert. denied 88 L. Ed. 43 (advance sheet);

Walling v. *Stone,* 131 Fed. (2d) 461, 462, 463 (C. C. A., 7th);

Garrity v. *Bagold Corp.,* 267 App. Div. 353, 46 N. Y. Supp. (2d) 637, (N. Y. App. Div. First Dept.);

Walsh v. *515 Madison Ave. Corp.,* 267 App. Div. 756, 45 N. Y. Supp. (2d) 927, (N. Y. App. Div. First Dept.), affirming 181 Misc. 219, 42 N. Y. Supp. (2d) 262.

The identical defense and counterclaim for reformation was decided adversely to petitioner's position in the following cases in addition to the case herein and its companion case of *Greenberg* v. *Arsenal* decided at the same time by the Circuit Court of Appeals for the Second Circuit.

Bailey v. *Karolyna,* 50 Fed. Supp. 142;

Garrity v. *Bagold Corp.,* 267 App. Div. 353, 46 N. Y. Supp. (2d) 637 (N. Y. App. Div. First Dept.);

Walsh v. *515 Madison Ave. Corp.,* 267 App. Div. 756, 45 N. Y. Supp. (2d) 927, (N. Y. App. Div. First Dept.), affirming 181 Misc. 219, 42 N. Y. Supp. (2d) 262.

The cases on the identical defense and counterclaim for reformation in the District Courts and the State Courts have been too numerous to mention and have been almost uniformly adverse to petitioner's position.

All the cases referred to *supra* which denied the identical defense and counterclaim for reformation, also rejected the defense of estoppel.

In connection with the general principles governing the degree of proof required and the nature of the proof required for reformation the following cases are in conflict with the position of petitioner herein.

Philippine Sugar Estates Development Co., Ltd. v. *Government of the Philippine Islands,* 247 U. S. 385;
Curtis v. *Albee,* 167 N. Y. 360;
Salomon v. *North British & Mercantile Ins. Co. of* N. Y., 215 N. Y. 214.

It has likewise been held with almost complete unanimity that liquidated damages and attorneys' fees should be assessed as a matter of law.

Rigopoulos v. *Kervan,* 140 Fed. (2d) 506 (C. C. A. 2nd);
Seneca Coal & Coke Co. v. *Lofton,* 136 Fed. (2d) 359, (C. C. A. 10th); cert. denied, 88 L. Ed. 43 (advance sheet);
O'Neill v. *Brooklyn Savings Bank,* — N. Y. — (affirming 267 App. Div. 317).

Not only did the petitioner fail to show any mutual mistake by the parties with regard to the applicability of the Fair Labor Standards Act at the time the union contracts were entered into, but an examination of the record will show that the overwhelming weight of the evidence

points to the opposite conclusion (332, 588, 778-779, 950-954, 960-964).

Likewise, the contention that the imposition of liquidated damages and counsel fees constitutes an unconstitutional application of the Act is without merit and has been so determined in the applicable decisions of this Court. In *U. S.* v. *Darby,* 312 U. S. 100, this Court upheld the constitutionality of the Act. In *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, this Court held that the liquidated damage provision of the Act was not a penalty.

POINT C.

No adequate reason is set forth in the petition herein for a review by this Court in this case.

In the light of the facts hereinbefore presented and in view of the provisions of Rule 38, Subdivision 5 of this Court, it becomes evident that no special and important reasons have been shown why this Court need pass on this case. It was admitted herein that the respondents worked for workweeks in excess of the maximum set forth in the Act. Using the method of computation repeatedly applied by this Court, respondents did not receive time and a half for their overtime. Their coverage was determined by this Court in *Kirschbaum Co.* v. *Walling* (combined with *Arsenal Bldg. Corp.* v. *Walling*), 316 U. S. 517. The petitioner has raised extremely technical defenses in an attempt to defeat recovery under a remedial statute. In both the District Court and the Circuit Court, petitioner's position has been rejected both on the facts and on the law, and on the questions involved there is substantial unanimity in all the courts of the land. There remains no important question of law in this case which has not been settled by this Court.

Conclusion.

It is therefore requested that the petition herein for a writ of certiorari be denied.

Respectfully submitted,

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